IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 14-60796

ENTERGY MISSISSIPPI, INCORPORATED,

Petitioner – Cross Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent – Cross Petitioner

PETITION FOR PANEL REHEARING BY PETITIONER/CROSS-RESPONDENT, ENTERGY MISSISSIPPI, INCORPORATED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Benjamin H. Banta of Entergy Services, Inc., counsel for the Petitioner – Cross Respondent in this appeal, Entergy Mississippi, Inc. Entergy Services, Inc. is a wholly-owned subsidiary of Entergy Corporation and is an affiliate of Entergy Mississippi, Inc.
2. Linda Dreeben, counsel for the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.
3. Entergy Corporation, which is the parent corporation of Entergy Mississippi, Inc., which, in turn, is the Petitioner – Cross Respondent in this appeal.

4. Entergy Mississippi, Inc., the Petitioner – Cross Respondent in this appeal.

5. Jill A. Griffin, counsel for the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.

6. Elizabeth Ann Heaney, counsel for the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.

7. International Brotherhood of Electrical Workers, Local Unions 605 and 985, AFL-CIO-CLC, the Intervenor in this appeal.

8. Nora Leyland of Sherman, Dunn, Cohen, Leifer & Yellig, P.C., counsel for the Intervenor in this appeal, the International Brotherhood of Electrical Workers, Local Unions 605 and 985, AFL-CIO-CLC.

9. M. Kathleen McKinney, Regional Director of Region 15 of the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.

10. The National Labor Relations Board, the Respondent – Cross Petitioner in this appeal.

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QUESTION PRESENTED FOR PANEL REHEARING

This matter involves a petition for review by Petitioner/Cross-Respondent, Entergy Mississippi, Incorporated ("Entergy"), and a cross-petition for enforcement of an order of the National Labor Relations Board ("the Board") concerning the status of a certain group of Entergy's employees – dispatchers – under the National Labor Relations Act, 29 U.S.C. §§ 151-169. On March 3, 2016, after briefing and oral argument, this Court filed its Opinion, affirming in part and reversing in part the Board's decision as follows:

> There is substantial evidence to support the Board's determination that dispatchers do not "responsibly direct" field employees or "assign" them to a "time" or "significant overall duty." But the Board **ignored** evidence that arguably shows that dispatchers "assign" field employees to "locations" using "independent judgment." We affirm in part and reverse in part the Board's decision that dispatchers are not supervisors.
>
> * * *
>
> The Board **ignored significant portions of the record** that show how dispatchers arguably exercise independent judgment when deciding how to allocate Entergy's field workers.
>
> * * *
>
> [T]he evidence discussed above arguably shows that dispatchers "assign" field employees to places by exercising "independent judgment." Yet the Board **ignored** this evidence when explaining its reasoning. Decisions by the Board that **ignore** a relevant portion of the record cannot survive substantial evidence review. Accordingly, we reverse the Board's decision that dispatchers do not exercise "independent judgment" when assigning employees to locations and remand for further proceedings on this narrow question.

* * *

> We REVERSE the Board's determination that dispatchers do not "assign" field employees to "places" through the exercise of "independent judgment" and we REMAND for further proceedings. The Board cross-appeals, asking this court to enforce its order. Because we hold the Board erred, we DENY the Board's request for enforcement.

(Doc. No. 00513297166, Slip Opinion pp. 9, 12, 14, and 16) (internal citations omitted) (emphasis added).

Entergy now respectfully asks the Panel to grant a limited rehearing under Fed. R. App. P. 40 to consider the following issue in its Opinion and to partially reverse its Judgment Enforcing an Order of the Board entered on September 30, 2016:

1. Whether the Panel erred by ordering this case to be remanded to the Board to determine – for a second time, and after incredibly delay – whether dispatchers use "independent judgment" when assigning field employees to locations. The Board has already been presented ample evidence of dispatchers' independent judgment, yet the Board *ignored* that evidence and, thus, does not deserve any remand.

STATEMENT OF THE CASE

This case has a long and tortuous procedural history spanning more than thirteen years – all without final resolution. The procedural history and facts of this matter are set forth in pages 1-10 of this Court's Opinion (Document

00513297166), as well as pages 3-10 of Entergy's Original Brief (Document 00512978895).

ARGUMENT

I. The Panel erred in ordering remand of this case to the Board to determine – for the second time – whether dispatchers use "independent judgment" when assigning field employees to locations.

This Court dedicated nearly three pages of its Opinion to specifying the litany of record evidence supporting the conclusion that dispatchers exercise independent judgment when assigning field employees to a place – including, without limitation, the extensive testimony from union manager, Albert May, detailing the numerous factors dispatchers consider in assigning field employees during multiple outage situations. (Doc. No. 00513297166, Slip Opinion, pp. 12-14.) Yet, as this Court recognized, all of this evidence was "ignored" by the Board when reaching its conclusory determination that dispatchers do not exercise independent judgment in assigning field employees to locations. (*Id*.) Although the Board had every opportunity to consider this evidence of dispatchers' independent judgment, it failed (or refused) to do so. And, as a result, this Court held that the Board's determination that dispatchers lacked "independent judgment" when assigning employees to locations could not survive substantial evidence review. (*Id*. at p. 14.) Despite recognizing these serious errors by the Board, the Court then remanded this narrow issue back to the Board for further

consideration. (*Id*.) Entergy respectfully asserts that remand of this issue to the Board is unwarranted, inappropriate, and unduly prejudicial to Entergy – for the specific reasons detailed herein.

A. In similar cases where the Board ignored evidence of "independent judgment," the Fifth Circuit and other appellate courts have consistently vacated orders by the Board and held that employees were statutory supervisors – without remand.

The statutory provisions which permit the Board to petition a court of appeals for an enforcement order (29 U.S.C. § 160(e)) and permit any party to seek review of a final order of the Board by a court of appeals (29 U.S.C. § 160(f)) do not require remand. And appellate courts, including the Fifth Circuit, reviewing petitions from the Board and parties pursuant to these statutory provisions routinely grant a party's petition for review, vacate the Board's order, and deny enforcement of the Board's order – all without ordering remand and allowing the Board an unwarranted second bite at the apple. *See, e.g., DirecTV Holdings, L.L.C. v. NLRB,* 650 F. App'x 846, 852-53 (5th Cir. 2016) (noting that the ALJ and Board ignored evidence concerning five employees presented by DirecTV and granting DirecTV's petition for review, denying the Board's petition for enforcement, and setting aside the Board's order – without remand).[1]

[1] *See also NLRB v. Int'l Bhd. of Teamsters, Local 251*, 691 F.3d 49, 60 (1st Cir. 2012) (noting that the Board "ignored evidence of the surrounding circumstances" and "revers[ing] the Board's decision" – without remand); *Tri-State Health Serv. v. NLRB*, 374 F.3d 347, 356 & n.11, 357 (5th Cir. 2004) (holding that the Board "erred in failing to consider" and "ignoring altogether evidence" and granting the petition for review, vacating the Board's opinion, dismissing charges

Furthermore, in cases remarkably similar to the present matter – where the Board ignored evidence of employees' "independent judgment" when concluding that the employees were not statutory supervisors – appellate courts have simply vacated the Board's order without ordering remand and held that the employees did, indeed, exercise the requisite "independent judgment" to qualify as statutory supervisors. *See, e.g., GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 409, 412 (6th Cir. 2013) (noting that the Board's "failure to acknowledge" certain evidence "does not support the Board's decision that RNs at the Center lack authority to discipline CNAs using their independent judgment" and granting the Center's petition for review, vacating the Board's order, and denying the Board's cross-application for enforcement – without remand); *Lakeland Health Care Assocs., LLC v. NLRB*, 696 F.3d 1332, 1339, 1350 (11th Cir. 2012) (noting that the "the Board again disregards compelling and uncontradicted evidence" and testimony that LPNs exercised independent judgment as statutory supervisors and granting Lakeland's petition for review, denying the Board's cross-petition for enforcement,

against the petitioner, and denying the Board's cross-petition for enforcement – without remand); *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 516 (7th Cir. 2003) (finding that "the Board or ALJ simply ignored strains of evidence that did not mesh with their ultimate conclusions" and granting Sears's petition for review and denying the Board's enforcement order – without remand); *Cleveland Constr. v. NLRB*, 44 F.3d 1010, 1016 (D.C. Cir. 1995) (holding that the Board's "ignoring of evidence on this and other factors of the precedentially dictated test compel us to set aside the Board's action in this case" and granting the petition for review, vacating the Board's opinion, and denying the Board's application for enforcement – without remand); *NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262, 1274 (4th Cir. 1994) (noting that "the Board has ignored uncontradicted evidence in the record which clearly negates the inference which the Board has attached to these facts" and granting the petitioner's petition for review, setting aside the decision of the Board, and denying the Board's enforcement order – without remand).

and vacating the Board's decision – without remand); *Grancare, Inc. v. NLRB*, 137 F.3d 372, 375-76 (6th Cir. 1998) (finding that the Board "ignored substantial evidence" of a nurse's authority and responsibility as statutory supervisor to direct aides and granting Heritage's petition for review, holding nurses to be statutory supervisors, denying the Board's cross-petition for enforcement, and vacating the Board's order – without remand); *Me. Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 363, 366 (1st Cir. 1980) (noting "[t]here is considerable evidence of the [shift operating supervisors'] supervisory status which the Board either ignored completely or downplayed to an unjustified extent" and granting the petition for review, denying the Board's application for enforcement of its order, and holding that the shift operating supervisors were statutory supervisors – without remand).

The Fifth Circuit itself has denied enforcement of an order by the Board and held employees to be statutory supervisors, without ordering remand, upon finding that the Board ignored testimony of "independent judgment" and other evidence of employees' supervisory status. *NLRB v. McCullough Envtl. Servs.*, 5 F.3d 923 (5th Cir. 1993). In *McCullough*, the Board determined that lead operators of the McCullough water treatment facility were not statutory supervisors. But, on review on the Board's decision, this Court held that the Board ignored record evidence and testimony to reach its conclusion. This Court specifically noted, for example, that while the Board held that lead operators were not responsible for the

performance of other employees, the Board ignored testimony from a lead operator that he was solely responsible for the operation of the plant during an eight-hour shift. *Id*. at 940-41 & n.26. Additionally, although the Board determined that lead operators did not exercise "independent judgment" by citing to the testimony of two witnesses who claimed that they could not assign overtime work, the Fifth Circuit noted that the Board ignored contrary testimony from a third witness and "ignore[d] the nature of McCullough's operations." *Id*. at 942 & n.29. Accordingly, the Fifth Circuit denied the Board's application to enforce its order and instead held – without ordering remand – that these lead operators were statutory supervisors to be excluded from the bargaining unit. *Id*. at 944.[2]

The present matter is decidedly similar to *McCullough*, other precedent from this Court, and the numerous cases from other appellate courts. Just as the Board in *McCullough* selectively cited to evidence that operators lacked "independent judgment" and ignored testimony from a witness that he could approve overtime pay for employees, the Board in this case summarily determined that dispatchers lacked "independent judgment" and "ignored significant portions of the records [including from Union Manager, Albert May] that show how dispatchers arguably exercise independent judgment when decided how to allocate Entergy's field

[2] *See also, Entergy Gulf Sts., Inc. v. NLRB*, 253 F.3d 203, 211 (5th Cir. 2001) (reversing Board's order that Entergy's operations coordinators did not qualify as statutory supervisors and holding that operations coordinators did responsibly direct field workers with independent judgment and were statutory supervisors – without remand).

workers." (Doc. No. 00513297166, Slip Opinion p. 12.) Therefore, like the Fifth Circuit in *McCullough* (and the other appellate courts in *Springfield*, *Lakeland*, *Grancare*, and *Yankee Atomic*) simply found employees to be statutory supervisors based upon the entire record and did not allow the Board to re-consider evidence that it had previously ignored, this Panel should hold that Entergy's dispatchers were statutory supervisors who exercised "independent judgment" when assigning employees to locations – without ordering remand.

In support of its decision to remand, this Panel cited to a single Fifth Circuit decision – *Amoco Prod. Co. v. NLRB*, 613 F.2d 107 (5th Cir. 1980) – which is decidedly distinguishable. (Doc. No. 00513297166, Slip Opinion p. 12.) In *Amoco*, the Fifth Circuit rejected the petitioner's claim because the record was insufficient to determine what facts the Board relied upon in making its decision, and the court remanded the case to provide the Board with an opportunity to clarify the record. In reaching its original decision, the Board had adopted the ALJ's findings of fact and conclusions of law, which the court noted were "obscure." 613 F.2d at 110. Based on the record, the Fifth Circuit could only "precariously assume" which statements were relied upon as findings of fact and was left "confused as to both the legal and factual bases of the Board's decision." *Id*. at 111.

Unlike the "obscure" record in *Amoco* which left the Fifth Circuit "confused" as to the evidence presented and relied upon by the Board, there is nothing confusing or obscure about the evidence before the Board in this matter. As this Court correctly recognized and detailed in nearly three pages of its Opinion, the Board was presented with a litany of specific evidence and simply ignored the portions – such as testimony from a union manager, evidence showing that dispatchers' judgment in allocating field workers is guided by discretionary factors, and evidence that dispatchers exercise discretion and judgment when assigning crews to trouble spots, prioritizing problems, and determining whether to hold out personnel and/or call out additional personnel – which did not support its conclusory findings. (Doc. No. 00513297166, Slip Opinion p. 12.) While remand may be appropriate in instances such as *Amoco* where it is unclear what evidence the Board considered and based its decision upon, remand is decidedly inappropriate in cases like this one where the Board was clearly presented with, but willfully ignored, contrary evidence and testimony.

Indeed, the Board itself apparently found the evidence presented to be sufficient since it has, at no point, ever requested that the matter be remanded for further consideration or additional findings. Pursuant to 29 U.S.C. § 160(e), the Board could have requested a remand of this matter. But it never did so. Because the Board failed to timely request remand, this Panel should adhere to the

precedent established by the Fifth Circuit and other appellate courts in substantially similar cases and should simply vacate the Board's order and hold that Entergy's dispatchers were statutory supervisors who exercised the requisite "independent judgment."

B. Remand is further unwarranted and inappropriate because the Board failed to acknowledge specific evidence of "independent judgment" in its brief and should be prevented from raising such waived arguments for the first time on remand.

The First Circuit's opinion in *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1 (1st Cir. 2015), which was expressly cited to and relied upon in this Court's opinion, is further analogous and instructive in undercutting remand to the Board. (Doc. No. 00513297166, Slip Opinion pp. 9, 14.) Similar to the present matter, the *NSTAR* court considered whether certain employees of an electrical and gas company qualified as statutory supervisors under the National Labor Relations Act. Like Entergy's dispatchers, the NSTAR employees were responsible for monitoring transmission systems, de-energizing electrical equipment in order to perform maintenance operations, reacting to unforeseen events that disrupted transmission systems, and ensuring that scheduled maintenance work could be performed as needed. *Id*. at 7-8. And, like the present matter, the Board in *NSTAR* considered, among other arguments, whether these employees were statutory supervisors who exercised "independent judgment" to assign field workers to a location. *Id*. at 12-

14. In examining this "independent judgment," the Acting Regional Director for the Board specifically found that:

> [I]n multiple outage situations [electrical transmission system supervisors or TSSs] prioritize trouble cases, and based upon the status of a case, can route field employees from one trouble case to another trouble case. In prioritizing such cases, the TSSs consider such things as the number of customers affected, the size of the customer, and the weather.

Id. at 14 & n.13. However, the Acting Regional Director concluded that assignments resulting from these prioritization decisions did not require the use of "independent judgment" because they were "controlled by detailed instructions." *Id*.

The First Circuit cast doubt on the Board's conclusion, noting that "[i]t is not immediately clear to us how judgment of the type described by the Acting Regional Director's finding regarding prioritization of trouble spots could be circumscribed by detailed instructions." *Id*. But since NSTAR's brief presented no evidence or argument that this finding by the Acting Regional Director demonstrated that the TSSs exercised independent judgment in such circumstances, the First Circuit ruled that "NSTAR had failed to show that any assignments the TSSs made by designating an employee to a place required the exercise of independent judgment." *Id*. at 14. The First Circuit then granted the Board's application for enforcement and denied NSTAR's cross-petition for

review – expressly finding that NSTAR had waived its right to assert on remand what it had not raised in its brief. *Id*. at 26.

Similar to *NSTAR*, the Board in this case failed to acknowledge certain evidence of "independent judgment" in its brief and should be prevented from raising such waived arguments for the first time on remand. In its brief, Entergy explicitly cited to the very evidence of independent judgment that this Court recognized was ignored by the Board. (Doc. No. 00512978895, pp. 48-51.) For example, in its brief, Entergy argued and cited to evidence showing that dispatchers exercise independent judgment when assigning crews to trouble spots, prioritizing problems, and determining whether to hold out personnel and/or call out additional personnel. (*Id*. at p. 50.) Entergy further cited to specific testimony from the union manager stating that dispatchers must weigh "a lot of information" when assigning employees to locations. (*Id*. at p. 51.) As this Panel later recognized it its Opinion, Entergy's brief noted that "the Board's opinion fail[ed] to consider – much less analyze" any of this evidence of "independent judgment." (*Id*.)

The Board's brief – like its original opinion – failed to explain, or even acknowledge, how this specific evidence of dispatchers' discretion and judgment could fail to establish "independent judgment" when assigning employees to locations. (Doc. No. 00513015370, at pp. 38-42.) Instead, the Board chose to

ignore this evidence – first in its original opinion and then in its brief before this Court – thereby waiving its right to later consider and rebut such evidence. Therefore, like the First Circuit in *NSTAR* did not allow remand and did not permit NSTAR to assert arguments on "independent judgment" that it had not raised in is brief, this Court should find that the Board has failed to consider and rebut specific evidence of independent judgment and should decline to allow the Board an unwarranted (and unasked for) second chance to assert these waived arguments on remand.[3]

C. Remand is further unwarranted and inappropriate given the Board's repeated and inordinate history of delay.

As a point of equity, Entergy asserts that remand is especially unwarranted given the Board's unreasonable **thirteen-year delay** in determining the

[3] Declining remand to prevent an unwarranted second bite of the apple – especially on an issue that the Board ignored evidence of at the NLRB stage and also in its brief to this Court – is a tactic that has been recognized and employed by the Board itself. *See, e.g., Laborers Local 190 (VP Builders, Inc.),* 355 NLRB 532, 534 (2010) (declining to remand case for ALJ to address a theory because doing so would give "the General Counsel an unwarranted 'second bite of the apple' by permitting litigation of an issue that he has effectively chosen not to pursue"); *Paul Mueller Co.*, 332 NLRB 1350, 1350-51 (2000) (declining to give General Counsel a "second bite of the apple" through remand that would have effectively permitted litigation of a theory General Counsel had ignored or disclaimed). And appellate courts have similarly refused to permit remand and allow a party an unwarranted second bite of the apple to consider and counter evidence that was previously introduced. *See, e.g., Bloom v. Hartford Life & Accident Ins. Co.,* 558 F. App'x 854, 856-57 (11th Cir. 2014) ("[W]e decline plaintiff's invitation to remand for a second bite at the apple."); *United States v. Dagostino*, 520 F. App'x 90, 92 (3d Cir. 2013) (recognizing that courts may permit remand where a party "did not have a fair opportunity to fully counter [a party's] evidence," but refusing to remand where "[t]he Government had a fair opportunity to submit evidence of the victim's loss, and to allow the Government to submit new evidence on remand would grant it a second bite at the apple") (internal quotations and citations omitted).

supervisory status of Entergy's dispatchers. This case originated more than a decade ago in 2003, when Entergy first filed a unit-clarification petition, lawfully seeking to remove the dispatchers from the bargaining unit. What proceeded was a series of repeated and inordinate delays by the Board[4] – all of which has hindered Entergy as it attempted to deal with the uncertainty of the dispatchers' status and has caused actual prejudice to Entergy because the Union can unjustly claim additional liability. To permit remand of this issue back to the Board, again, is unduly prejudiced and unjust in light of the unique delay in this case.

CONCLUSION

For the foregoing reasons, Entergy respectfully asks the Panel to grant rehearing, to partially reverse its Judgment enforcing an Order of the Board, to vacate the Board's determinations concerning dispatchers' use of "independent

[4] Following a hearing in 2003 and the Board's acceptance of the case for review in 2004, the Board waited more than two years before doing anything – and, at that time, it merely remanded the case back to Region 15 for further consideration in light of the *Oakwood Healthcare*, 348 N.L.R.B. 686 (2006) trilogy. Again, after a hearing in 2006 and supplemental briefing, the Board accepted the case for review on April 11, 2007. But the Board did nothing for nearly five years (!), before finally issuing a decision on December 30, 2011. Even following this decision, however, the Board's pattern of delay continued while it defended (for four years) President Obama's invalid recess appointments to the Board. And even after the Supreme Court unanimously ruled unconstitutional these appointments with its *Noel Canning* decision, the Board continued their delay tactics by insisting that the case be remanded back to the Board for consideration, instead of allowing this Court to immediately consider the merits of the case as urged by EMI in accordance with this Court's decision in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) and various decisions of other Courts of Appeals. *See, e.g., NLRB v. Enter. Leasing Co. Southeast, L.L.C.*, 722 F.3d 609, 660 (4th Cir. 2013), *cert. denied* No. 13-671, 2014 U.S. LEXIS 4689 (2014); *NLRB v. New Vista Nursing & Rehab.*, 719 F.2d 203, 244 (3d Cir. 2013). These delays were completely unnecessary and caused the case to languish for, cumulatively, several more years.

judgment" when assigning field employees, and to grant Entergy's petition on these limited issues – without remand.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. Rules 25.2.1 and .13, I certify that any required privacy redactions have been made; the electronic submission is an exact copy of the paper document; and the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Pursuant to 5th Cir. Rule 40, I certify that this petition for panel rehearing complies with the 15-page limit of Fed. R. App. P. 40(b) and Fifth Circuit 40.3 because it does not exceed 15 pages in length, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. R. 32.2.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 software in Times New Roman 14-point font.

I understand that a material misrepresentation in completing this certificate or circumvention of the type-volume limits in Fed. R. App. 32(a)(7) may result in the Court striking the petition and imposing sanctions against the person signing the brief.

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CERTIFICATE OF SERVICE

I hereby certify on November 14, 2016, that a true and correct copy of this document was served via electronic means through transmission facilities from the Court upon those parties authorized to participate and access the Electronic Filing System for this Court in the above-captioned action:

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